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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF CITIZENS FOR A SOUND ECONOMY FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS TURNER BROADCASTING SYSTEM, INC., ET AL. IN CASE NO. 93-44

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
BACKGROUND STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. *O'BRIEN*'S DEFERENTIAL TEST IS INAPPROPRIATE TO REVIEW SPEAKER-SPECIFIC, CONTENT-BASED REGULATIONS	4
A. Must-Carry Regulations Are Directed At Speech	5
B. Must-Carry Regulations Are Content-Based Intrusions On Editorial Discretion	6
II. FIRST AMENDMENT PROTECTION FOR SPEECH SHOULD NOT VARY BASED ON THE MEDIUM USED	9
A. This Court Has Justified Lower First Amendment Protection By Distinguishing New Media From The Print Press	11
1. Cinema	12
2. Broadcast	12
3. Cable	13
B. First Amendment Values Do Not Justify Content-Based Regulation	17
III. THIS COURT SHOULD DISCARD MEDIUM-BASED RIGHTS APPROACH AND ADOPT A MESSAGE-BASED RIGHTS APPROACH	19
CONCLUSION	23

TABLE OF AUTHORITIES

Cases — Page

Associated Press v. United States, 326 U.S. 1 (1945) 5
Buckley v. Valeo, 424 U.S. 1 (1976) 8
City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 5
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 7, 10, 11
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 8
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 4, 9
Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991) 6
Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) ..... *passim*
Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) 13
FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 13
FCC v. Midwest Video Corp., 440 U.S. 689 (1979) 7
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 13
Freedman v. Maryland, 380 U.S. 51 (1965) 12
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 12
Leathers v. Medlock, 111 S. Ct. 1438 (1991) 5, 10
Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 9
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) ..... *passim*
Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 5
Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230 (1915) 12
National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 12
Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) 13

TABLE OF AUTHORITIES—Continued

Page

Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986) 6, 7
Preferred Communications, Inc. v. City of Los Angeles, Calif., 754 F.2d 1396 (9th Cir. 1985), *aff'd sub nom. City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) 14, 16, 17
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 7
Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ..... *passim*
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) ..... *passim*
Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) 6, 18, 19
Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S. Ct. 501 (1991) 10
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 11
Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (1986), *cert. denied*, 482 U.S. 919 (1987) 20
Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383 (S.D. Fla. 1991) 13
Texas v. Johnson, 491 U.S. 397 (1989) 4
Turner Broadcasting System, Inc. v. FCC, 113 S. Ct. 1806 (1993) 10
United States v. Albertini, 472 U.S. 675 (1985) 9
United States v. O'Brien, 391 U.S. 367 (1968) ..... *passim*
Ward v. Rock Against Racism, 491 U.S. 781 (1989) 4, 9

Constitution and Statutes

U.S. Const. Amend. I ..... *passim*
Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 15
47 U.S.C. § 532 15
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 102 Stat. 1460 2
§ 2(a)(6)-(12), 106 Stat. 1461 18

TABLE OF AUTHORITIES—Continued

	Page
§ 2(a)(11), 106 Stat. 1461	8
§ 4 (47 U.S.C. § 534)	2
§ 4(b)(1)(B) (47 U.S.C. § 534(b)(1)(B))	2
§ 5 (47 U.S.C. § 535)	2
Miscellaneous	
J. Emord, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT (1993)	11
George Gilder, *What Spectrum Shortage?*, FORBES, May 27, 1991	19
Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 Univ. Pa. L. Rev. 1335 (1986)	14
P. Huber, M. Kellogg & J. Thorne, THE GEODESIC NETWORK II: 1993 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY (1992)	21
Elizabeth Kastor, *It's a Wrap: Dallas Kills Film Board; To Save $60,000, City Stops Rating Movies*, Wash. Post, Aug. 13, 1993	12
William E. Lee, *Cable Franchising and the First Amendment*, 36 Vand. L. Rev. 867 (1983)	14
Licensing Broadcasters: Just What the Framers Feared?, CATO POLICY REPORT (Jan./Feb. 1988)	21
I. Pool, TECHNOLOGIES OF FREEDOM (1983)	10, 11
Glen O. Robinson, *Cable Television and the First Amendment*, 6 Comm. & the Law, 47 (1984)	18
A. Schlesinger, PRELUDE TO INDEPENDENCE (1958)	16
S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 *U.S.C.C.A.N.* 1133	18
U.S. Congress, Office of Technology Assessment, *Science, Technology and the First Amendment*, OTA-CIT-369 (Washington, D.C.: U.S. Government Printing Office, January 1988)	20

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INTEREST OF THE AMICUS CURIAE

Citizens for a Sound Economy Foundation ("CSE Foundation") submits this brief as amicus curiae in support of Appellants Turner Broadcasting System, Inc., et al.[1] Amicus CSE Foundation is a non-profit 501(c)(3) educational institution which promotes initiatives that foster economic growth and enhance the quality of life

[1] Consistent with Supreme Court Rule 37.3, all parties have given CSE Foundation their consent to the filing of this brief.

for its 250,00 members and all consumers. Amicus wishes to bring information to this Court's attention concerning why these must-carry regulations violate the First Amendment, and more importantly, why this Court should recognize full First Amendment protection for cable and all other electronic publishers. Lesser protection would inevitably burden the free speech of all and hinder technological advancements to the detriment of consumers and Amicus CSE Foundation's members.

BACKGROUND STATEMENT

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 102 Stat. 1460 (47 U.S.C. §§ 534, 535) ("Cable Act of 1992") require cable operators to carry certain local broadcast stations on their cable systems.[2] Both sections prohibit cable operators from altering the content of or receiving compensation for carrying such stations. In the decision below, the majority upheld these "must-carry" regulations, rejecting appellants' First Amendment challenge. The majority found that the must-carry regulations are essentially economic regulations designed to create competition in the video industry and redress cable operators' anticompetitive practices. The court rejected a strict scrutiny level of review and upheld the regulations after applying the more lenient test established in *United States v. O'Brien*, 391 U.S. 367 (1968). The dissent viewed the must-carry regulations as content-based regulations, applied strict scrutiny review, and concluded that the regulations violated appellants' First Amendment rights.

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[2] Section 4 concerns mandatory carriage with respect to local commercial television stations. 47 U.S.C. § 534. For example, cable operators with more than 12 usable activated channels must carry such stations up to 33% of its channel capacity. § 4(b)(1)(B), 47 U.S.C. § 534(b)(1)(B). Section 5 contains similar provisions with respect to local noncommercial educational television stations. 47 U.S.C. § 535.

SUMMARY OF ARGUMENT

The must-carry regulations are speaker-specific, content-based regulations on speech, and therefore, must be subject to strict scrutiny review. *O'Brien*'s deferential test is inappropriate and dangerously inadequate to review these regulations, which strike at the core of free speech: editorial discretion. These regulations would not survive strict scrutiny review.

This Court should also recognize that cable operators (and cable programmers) are entitled to enjoy the same level of First Amendment protection that this Court has recognized for the print press. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

This Court's jurisprudence has thus far provided that some speakers have less First Amendment protection based on their *medium* of communication. First Amendment protection should not be based on the nature of the medium. Rather, all speech should be fully protected by the First Amendment no matter how it is delivered. The Information Age we live in is marked by a continuous revolution in telecommunications technology. A First Amendment jurisprudence that seeks to define rights by reference to extant technology will be forever outmoded and, more importantly, will infringe upon the protected speech of new electronic speakers.

ARGUMENT

I. *O'BRIEN*'S DEFERENTIAL TEST IS INAPPROPRIATE TO REVIEW SPEAKER-SPECIFIC, CONTENT-BASED REGULATIONS

O'Brien's deferential review is applicable only to those general regulations directed at "noncommunicative conduct" and "not related to expression" that have an *incidental* impact on the exercise of free speech.[3] The statute at issue in *O'Brien*, which prohibited the destruction of a Selective Service draft card, was upheld because it "plainly [did] not abridge free speech on its face . . . and deal[t] with *conduct* having no connection with speech." *United States v. O'Brien*, 391 U.S. at 375 (emphasis added).[4] *O'Brien*'s less burdensome standard is inappropriate to review the speaker-specific, content-based must-carry regulations.

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[3] *Texas v. Johnson*, 491 U.S. 397, 403 (1989). Under *O'Brien*, a "government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. at 377.

[4] This Court recently emphasized *O'Brien*'s limited applicability: "In stating, moreover, that *O'Brien*'s test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,' we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule." *Texas v. Johnson*, 491 U.S. at 407 (1989), *quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (internal citations omitted). Similarly, time, place, and manner restrictions must be "'*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added in *Ward*).

A. Must-Carry Regulations Are Directed At Speech

The must-carry regulations target "speech" and, therefore, *O'Brien*'s premise is never met. There is no "nonspeech" or "noncommunicative" element present.[5] Cable operators exist to deliver programming, speech protected under the First Amendment.[6] This Court's jurisprudence views laws that target the press as presumptively unconstitutional and subject to strict scrutiny review. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down a special use tax on ink and paper).

Because these regulations target a specific press medium, and are not generally applicable, the government is wrong in its suggestion that *Associated Press v. United States*, 326 U.S. 1 (1945) provides the proper framework for review. Government's Motion to Affirm ("Govt. Motion") at 10. That case upheld the application of a *generally* applicable law, the Sherman Antitrust Act, to anticompetitive activities of the press.

The government attempts to bring these speaker-specific regulations under *Associated Press* by equating a *specific* enforcement action against the press brought under the antitrust laws with a law that *targets* the press. Govt. Motion at 11 n.8. Obviously, all general laws must be applied against specific parties, including members of the

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[5] Any noncommunicative function of the cable industry, such as laying wire, is constitutionally indistinguishable from the noncommunicative functions of the print press, such as building a printing press or purchasing ink. Both are necessary functions to deliver the message and therefore this Court has always treated legislation targeting such functions as attacks on speech and therefore subject to strict scrutiny review. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

[6] *See, e.g., Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1991) (Cable television "is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'").

press. As this Court has noted, "generally applicable laws do not offend the First Amendment simply because their *enforcement against the press* has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991) (emphasis added).

If the cable industry is engaging in anticompetitive practices, the government may prosecute under the antitrust laws. The regulations at issue here have nothing to do with the general "business" aspects of the cable industry. Rather, they target the press's "speech," and therefore, *O'Brien* is inapplicable. The nature of these regulations require strict scrutiny review.

B. Must-Carry Regulations Are Content-Based Intrusions On Editorial Discretion

The must-carry regulations are content-based intrusions because they require cable operators to carry another's message, regardless of the cable operator's preference. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech . . . [T]herefore [such a law is a] content-based regulation of speech." *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988). This Court's rulings make it clear that it is impermissible to "identif[y] a favored speaker 'based on the identity of the interests that [the speaker] may represent' and force[] the speaker's opponent . . . to assist in disseminating the [favored] speaker's message." *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 15 (1986), *quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

The First Amendment protects "the decision of both what to say and what *not* to say." *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. at 797 (emphasis in original). This infringement on the cable operator's "choice[] of what to say and what to leave unsaid . . . [is] impermissible." *Pacific Gas & Elec. Co.*

v. Public Utilities Comm'n, 475 U.S. at 11.[7] In the press context, these regulations are particularly offensive to the First Amendment because they strike at the heart of a free press—editorial discretion. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).[8] As such, they must be subject to strict scrutiny review.

Because the must-carry regulations infringe on the editorial discretion of a member of the press, the lower court's reliance on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) to uphold the regulations is misplaced. In *PruneYard*, a shopping center owner had denied certain individuals permission to distribute information on his property. The California Supreme Court ruled that the state constitution required access to the shopping center. This Court rejected the shopping center owner's First Amendment argument that this state-based access requirement impermissibly burdened his First

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[7] In *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), this Court struck down a commission's order which required a utility company to include a third party's newsletter in its customer billing envelopes. "'The essential thrust of the First Amendment [includes] . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'" *Id.* at 11, *quoting Estate of Hemingway v. Random House*, 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 776, 244 N.E.2d 250, 255 (1968) (emphasis in original).

[8] This Court has recognized that cable operators exercise editorial discretion. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979). Cable operators follow a process similar to that of newspaper editors. They review potential programming sources, as a newspaper editor reviews wire copy. They select from among those sources particular kinds of programming to carry on their channels. That is a function akin to a newspaper editor's selection of copy. They choose channel placements for programming. That is a function akin to a newspaper editor's selection of column space to carry stories. With these basic commonalities, it cannot be seriously doubted that cable operators are editors.

Amendment rights, in part, because it concluded that such access did not intrude on any editorial discretion. Thus, *PruneYard* is inapposite to *federal* regulations targeting the press, particularly ones that infringe upon editorial discretion.

These regulations are also content-based because, as the dissent below noted, "Congress rested its decision to promote these [broadcast] stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.'" J.S. App. 51a, *quoting* Cable Act of 1992, § 2(a)(11), 106 Stat. 1461.[9] Thus, Congress selected a favored class of speakers (local broadcasters) to the detriment of another class (cable programmers).

As Judge Williams noted below, "[g]iven the finite number of channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down." J.S. App. 55a (footnote omitted).[10] But this Court has long recognized that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-9 (1976).

[9] This justification also makes the regulations content-based under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the Court concluded that an ordinance regulating adult movie theaters (defined by the content of the movies) was content-neutral because it was targeted not at the *content* of such movies but at the noncommunicative *secondary effects* of the theaters. Here, Congress has offered *no* secondary effect rationale unrelated to speech.

[10] *See also Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1451 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ("In the case of systems saturated with mandatory signals, cable programmers are shut out entirely from the only forum capable of conveying their programming.").

The danger in applying *O'Brien's* lenient standard of review to speaker-specific, content-based regulations is that the test's deference presumes the constitutionality of the statute at issue. All general regulatory statutes necessarily will have some limiting effect on free expression. Because the test is properly applied to review only general regulatory statutes not directed at speech, *O'Brien*'s interest-balancing test is heavily weighted in the government's favor. It presumes a statute's *incidental* impact on free speech is constitutionally permissible.[11]

Thus, *O'Brien* is dangerously inadequate to review the must-carry regulations because those regulations target the press (and therefore speech) and are content-based.[12] However, the conclusion that *O'Brien*'s deferential standard is inappropriate to review these regulations does not end the constitutional inquiry.

II. FIRST AMENDMENT PROTECTION FOR SPEECH SHOULD NOT VARY BASED ON THE MEDIUM USED

This Court's First Amendment jurisprudence has indicated that some speakers have less First Amendment protection due to the nature of the medium of communication. Thus, content-based regulations, such as the Fairness

[11] *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *United States v. Albertini*, 472 U.S. 675 (1985).

[12] Even under *O'Brien*'s less demanding standard, however, these must carry provisions must fail. As Appellant Turner notes in its Reply Brief, the "must carry provisions—divesting editorial discretion from *all* cable operators *as a class* for the benefit of *all* broadcasters *as a class* at the expense of *all* cable programmers *as a class*—are about the most blunt instruments imaginable for protecting against genuinely anticompetitive actions." Appellant Turner Broadcasting System, Inc.'s Reply Brief in Opposition to Motions to Affirm at 6. Thus, "a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Doctrine, have been upheld when applied to the broadcast medium, though found impermissible when applied to newspapers. *Compare Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), *with Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Were cable afforded the same First Amendment protection as newspapers, these must-carry regulations would not survive constitutional review.[13] The fundamental question before this Court then is whether cable should be given full First Amendment protection, as articulated in *Tornillo*, or whether, because of its medium of delivery, it is only entitled to a lower level of protection, similar to *Red Lion*.

Thus far, this Court has indicated, in sometimes cryptic terms, that cable television "is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers v. Medlock*, 111 S. Ct. at 1442.[14] Nevertheless, despite grappling with cable's status for over 20 years, this Court has been reluctant to define cable's First Amendment protection.[15] Unfortunately, this

[13] *See Turner Broadcasting Syst., Inc. v. FCC*, 113 S.Ct. 1806, 1807-08 (1993) (Rehnquist, C.J., in chambers) ("Under *Tornillo*, Congress plainly could not impose the must-carry provisions on privately owned newspapers."). In *Tornillo*, the Court struck down a right-of-reply statute without applying *any* balancing test. Other decisions have subjected content-based restrictions to strict scrutiny review and will only be upheld if the "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501, 509 (1991), *quoting Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). These must-carry regulations would not survive strict scrutiny review.

[14] This Court has recognized that cable operators exercise a significant amount of editorial discretion with respect to programming supplied to subscribers. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

[15] In *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), this Court noted that "[c]able television

Court's reluctance to recognize full First Amendment protection with respect to cable puts cable in familiar company with other new media developed in this century, such as motion pictures and broadcasting.[16]

A. This Court Has Justified Lower First Amendment Protection By Distinguishing New Media From The Print Press

In confronting new media, this Court has been very hesitant to grant full First Amendment protection comparable to that enjoyed by the print press. Rather, this Court has sought to distinguish new media from print media, thereby justifying a different (always lower) level of First Amendment protection for the former.[17] Unfortunately, because the Court has focused on the medium, and not the message, the government has been allowed to infringe severely upon the First Amendment rights of electronic publishers. The result: With the advent of the electronic age, a great deal of speech is subject to regulation inconsistent with First Amendment principles.[18]

partakes of some of the aspects of speech and the communication of ideas as do the traditional [press]." *Id.* at 494. This view demonstrates the long-standing bias against recognizing cable as a fully protected First Amendment speaker. Of what "aspects of speech" does the traditional press partake that cable does not? There seem to be none.

[16] *See, e.g.*, J. Emord, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT (1991).

[17] *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be addressed for First Amendment purposes by standards suited to it, for each may present its own problems.").

[18] Ithiel de Sola Pool explained the effect of the Court's approach as follows: "A long series of precedents, each based on the last and treating clumsy new technologies in their early forms as specialized business machines, has led to a scholastic set of dis-

1. *Cinema*

As curious as it may seem now, in 1915 this Court ruled that motion pictures were not part of the press and therefore did not merit any First Amendment protection. *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915). In upholding a censorship board to review motion pictures before distribution, this Court noted that motion pictures did not merit any First Amendment protection because "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press . . . ." *Id.* at 244.

In reasoning similar to that used to justify lower First Amendment protection for cable, the Court noted that motion pictures were mere conduits of another's information, "mere representations of events, of ideas and sentiments published and known." *Id.* at 244. It took *37* years before the Court specifically overruled *Mutual Film* in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).[19]

2. *Broadcast*

In confronting First Amendment rights asserted by radio and television broadcasters, this Court justified greater governmental regulation, including content controls, based on the physical scarcity of the spectrum and physical interference. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943) ("Unlike other modes of expression, radio inherently is not available to all. That

tinctions that no longer correspond to reality. As new technologies have acquired the functions of the press, they have not acquired the rights of the press." I. Pool, TECHNOLOGIES OF FREEDOM 250 (1983).

[19] Nevertheless, this Court ruled in 1965 that motion pictures could still be subject to censorship boards pursuant to certain procedural safeguards. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965). The last local movie review board was open until this past summer. *See* Elizabeth Kastor, *It's a Wrap: Dallas Kills Film Board; To Save $60,000, City Stops Rating Movies*, Wash. Post, Aug. 13, 1993, at D1.

is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."); *Red Lion Broadcasting Corp. v. FCC*, 395 U.S. 367, 390 (1969); *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court ruled that regulation of indecent broadcasting was justified because broadcasting was "uniquely pervasive" and "uniquely accessible to children." *Id.* at 748-49. By finding unique characteristics with respect to the *medium* of communication, the Court has justified content regulation of protected speech, which, if delivered through the print medium, would be struck down.

3. *Cable*

Like its predecessors, cable has been distinguished from the print press because of its mode of delivery. The most common arguments are that cable must use public rights of way, is a natural monopoly, and exercises much less editorial discretion than newspapers.[20] In this case, appellees have also argued that cable has received government assistance in securing the right to retransmit the programs of broadcast channels, free of charge (through compulsory copyright access), and that cable can privately censor broadcasters (a variant of the natural monopoly argument).

The public rights of way argument is fatally flawed. Newspapers, too, must use public rights of way for delivery, through the placement of vending machines on public sidewalks and the use of public streets by newspaper trucks. Even if a cable system did impose a slightly different burden, the proposition that such use (and reg-

[20] *See, e.g., Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991).

ulation) justifies *content* control does not follow. As *Quincy* recognized: "No doubt a municipality has some power to control the placement of newspaper vending machines. But any effort to use that power as the basis for dictating what must be placed in such machines would surely be invalid." [21]

A useful analogy may help expose the bias against non-print media inherent in this argument. Suppose a law required newspaper vendors who operate only on public sidewalks to carry the local newspapers or books by local writers. A vendor could sell *USA Today* but only if the vendor also carried the *Washington Post*. Such a law would be struck down before the ink was dry on the legislation. In this sense, the position of a cable operator is no different than our hypothetical newspaper vendor.

The natural monopoly private censorship argument is equally flawed. It is arguable whether cable is a natural monopoly, rather its monopolistic characteristics may be caused deliberately by political choices.[22] Nevertheless,

[21] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1449; *see also Preferred Communications, Inc. v. City of Los Angeles, Calif.*, 754 F.2d 1396, 1406 (9th Cir. 1985), *aff'd sub nom. City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); Lee, *Cable Franchising and the First Amendment*, 36 Vand. L. Rev. 867, 889-898 (1983) (arguing that this Court's decisions concerning regulation of public facilities, such as streets, provide constitutional protection against content-based intrusions).

[22] *Quincy* noted that "the 'economic scarcity' argument rests on the entirely unproven—and indeed doubtful—assumption that cable operators are in a position to exact monopolistic charges. . . Moreover, the tendency toward monopoly, if present at all, may well be attributable more to governmental action—particularly the municipal franchising process—than to any 'natural' economic phenomenon." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1450 (citations omitted); *see also* William E. Lee, *Cable Franchising and the First Amendment*, 36 Vand. L. Rev. 867, 880-887 (1983) (discussing lack of empirical proof and the need to define the relevant product market); Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 Univ. Pa. L. Rev. 1335 (1986).

"whatever the outcome of the debate over the monopolistic characteristics of cable, the Supreme Court has categorically rejected the suggestion that purely economic constraints on the number of voices available in a given community justify otherwise unwarranted intrusions into First Amendment rights." [23] In *Tornillo*, the Court went to great lengths to illustrate the prevalence of one-newspaper cities, the growth of national newspaper chains, and the prohibitive costs of entering the newspaper business. Despite such findings, this Court struck down a right-of-reply statute. Thus, the natural monopoly argument is irrelevant because "there is no meaningful 'distinction between cable television and newspapers on this point.'" *Id., quoting Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).[24]

The government argues that cable operators deserve less First Amendment protection because although they exercise editorial discretion, cable operators' "functions are quite distinct when they serve as passive conduits retransmitting the programming of others, rather than originating programming of their own." Govt. Motion at

[23] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1450, *citing Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1973).

[24] In an otherwise superb opinion—which reaches the right result and applies the proper standard of review to these must-carry provisions—Judge Williams errs when he suggests that the mandatory access provisions in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (47 U.S.C. § 532), as amended, would pass constitutional muster under *Tornillo*. He seeks to distinguish cable from print by noting its special character—"bottleneck control of access to an important medium." J.S. App. 71a. As discussed, *supra*, one-cable towns are often due to political factors. Moreover, *Tornillo* recognized the "bottleneck" features of the press industry and still rejected the right-of-reply statute. The gravamen of *Tornillo* was that all access provisions unconstitutionally intrude on editorial discretion.

27-28. The proposition that cable operators exercise less editorial discretion than newspapers because they transmit others programming is dubious at best. The content of many small town newspapers, for example, is generated not by the paper's staff writers but by national wire services. Similarly, most op ed pages of major newspapers carry syndicated writers, again merely transmitting a third party's message. But such "retransmissions" in newspapers are never used to classify newspapers as passive conduits.

Such a view also does not correspond with history. Arthur Schlesinger described the workings of the colonial newspaper editor: "Not until the rise of the troubles with Britain did the editor come to think of himself as a maker of opinion as well as a *transmitter* of news and literary offerings. Yet he unwittingly did something, however little, in that direction by the very act of deciding what to put in or leave out of his paper, and once in a great while he offered a terse comment of his own." [25]

Appel'ees argument that cable's prior receipt of governmental assistance justifies increased regulation is equally unavailing. As the dissent below noted, government largesse does not condemn one to second-class First Amendment protection. J.S. App. 70a. If that were the test, newspapers would surely be one of the most regulated industries. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 145 (1973) (Stewart, J., concurring) (noting that newspapers receive Government mail subsidies and a limited antitrust immunity).

Finally, the government's argument that cable is distinct from the print press because, unlike the print press, cable has been subject to a long history of regulation "merely begs the question." *Preferred Communications,*

[25] A. Schlesinger, PRELUDE TO INDEPENDENCE 61 (1958) (emphasis added).

Inc. v. City of Los Angeles, Calif., 754 F.2d 1396, 1405 n.8 (9th Cir. 1985), *aff'd sub nom. City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). This argument is akin to saying in the Reconstruction Era that because former slaves had been subject to slavery for 200 years, they would only be entitled to lower constitutional guarantees of freedom. Obviously, if something is wrong, the fact that it has been wrong a long time does not make it right.

All of the arguments attempting to distinguish cable from the print press to justify lower First Amendment protections ring hollow and emphasize the point that "[t]here is never a paucity of arguments in favor of limiting the freedom of the press." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 144 (Stewart, J., concurring).

B. First Amendment Values Do Not Justify Content-Based Regulation

Legislative intrusions on new electronic media are usually taken in pursuit of First Amendment "values"—thus the government steps in to ensure a vibrant marketplace of ideas. For example, in *Red Lion*, the Court cited the First Amendment's "ends and purposes" in sacrificing the editorial discretion of broadcasters and making the listener's interest paramount.[26]

In another decision, this Court noted "an unusual order of First Amendment values" present when considering the broadcast medium.[27] In justifying the must-carry regula-

[26] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. The Court added: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . [and] [i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Id.* at 390-91.

[27] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973).

tions, Congress cited the First Amendment values of promoting a diversity of views and ensuring that all viewers, not just cable subscribers, have access to local broadcast stations. Cable Act of 1992, § 2(a)(6)-(12), 106 Stat. 1461. Thus, the cable operator's editorial discretion would be sacrificed for a larger good.[28]

These actions (and justifications) run afoul of the basic principle that the First Amendment protects the press from governmental interference. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press." *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988), *quoting Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).[29]

Red Lion's audience-rights approach to the First Amendment turns the purpose of the Amendment on its head—a bulwark that guaranteed that the government may not interfere with free speech becomes the very excuse to interfere.[30] It is a "frightening specter" to view

[28] According to the Senate committee report to the Cable Act of 1922, "[t]he First Amendment also supports government regulations intended to promote a diversity of voices, even if some incidental loss of editorial discretion results. Local signal carriage regulations ensure that cable subscribers receive a diversity of voices, not just the signals chosen by the cable operator." S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 *U.S.C.C.A.N.* 1133, 1189.

[29] Thus, "[t]o this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Id.*; *see also Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 146 (Stewart, J., concurring) ("If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.").

[30] *See* Glen O. Robinson, *Cable Television and the First Amendment*, 6 Comm. & the Law 47, 53 (1984) (noting also that for constitutional adjudication, the audience-rights approach "seems mischievous; it undermines the very essence of the First Amendment, as a restraint on government interference, insofar as it subordinates the right of a speaker to speak what he wants to speak to the right of the listener to hear what he wants to hear.").

the First Amendment as "requir[ing] the government to impose controls upon private [speakers] in order to preserve First Amendment values." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 133 (Stewart, J., concurring).[31]

III. THIS COURT SHOULD DISCARD MEDIUM-BASED RIGHTS APPROACH AND ADOPT A MESSAGE-BASED RIGHTS APPROACH

The inclination to distinguish all other electronic media from print media, including cable, may ultimately diminish the traditional First Amendment protection afforded the print press. The Court's current approach of assigning different levels of protection based on the medium of delivery is on a collision course with technology.[32] The walls that have historically separated the categories are disappearing with technological advances and the old legal theories strain under these new circumstances. As

[31] Under an audience-rights theory, governmental interventions are meant to "preserve an uninhibited marketplace of ideas." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. But such thinking is directly contrary to the Court's conclusion in *Tornillo* that a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 257, *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *accord Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 791 (1988). It is not surprising that despite nearly identical facts, *Tornillo* does not mention *Red Lion*.

[32] For example, the advent of new spectrum technologies, such as digital compression technologies, have expanded the use of the spectrum exponentially in the past five years. Rather than being a limited or scarce commodity, the space on spectrum now can be considered to be unlimited, constrained only by economic considerations. *See, e.g.*, George Gilder, *What Spectrum Shortage?*, FORBES, May 27, 1991, at 324.

the Congressional Office of Technology Assessment concluded, "[n]ew technologies, such as electronic publishing, may not fit easily into old models of regulation, and First Amendment distinctions between rights of print publishers, broadcasters, and common carriers will become increasingly difficult to justify." [33]

For example, if this Court concludes that cable should only receive *Red Lion*-like protection, could an electronic edition of the Wall Street Journal delivered by cable to a subscriber's desktop be subject to a right-of-reply statute or fairness doctrine, while its printed counterpart delivered to that subscriber's door step is protected from such intrusions?

This scenario would seem to be the implication of *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) ("TRAC"). *TRAC* concerned whether *Red Lion* would govern teletext technology when it was sent through an otherwise unusuable portion of the spectrum.[34] Despite the similarities of teletext to the print medium, the D.C. Circuit concluded that when teletext used the spectrum, *Red Lion* governed.[35] In fact, Professor Robert

[33] U.S. Congress, Office of Technology Assessment, *Science, Technology and the First Amendment*, OTA-CIT-369 2 (Washington, D.C.: U.S. Government Printing Office, January 1988).

[34] Teletext is a form of electronic information services ("EIS"). Much of EIS is sent through telephone lines and cable. EIS is essentially an "electronic library" offering subscribers access to a wide array of topical databases, news, magazines, bulletin boards, and other information.

[35] In that opinion, the D.C. Circuit discussed at length the deficiencies in the scarcity rationale, noting that all economic goods, including newsprint and ink, are scarce. "The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion." *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d at 508. The government in this case implicitly acknowledges the bankruptcy of the spectrum scarcity rationale by trying to argue that the "critical factor" justifying broadcasting regulation has not been spectrum scarcity but the "resulting inability of the broadcast market to function successfully." Govt. Motion at 21.

Shanyon of the Annenberg School of Communications has argued that Congress constitutionally may be able to impose must-carry regulations on the *New York Times* and *Wall Street Journal* because they transport copy via satellite to printing plants across the country. "I think that the spectrum is limited, and if the big users shut out the small users, then the government should act to make fairness the ruling guideline." *See Licensing Broadcasters: Just What the Framers Feared?*, CATO POLICY REPORT, 6, 8-9 (Jan. Feb. 1988).

The future holds only more problems that defy categorization. Fiber optics will allow telephone companies or cable companies to deliver a multitude of services ranging from video to publishing to banking services. Today, technology has produced almost unlimited outlets of information. In the very near future, individuals can have instantaneous access to information from virtually unlimited sources.[36] Whether the fear of a too powerful press limiting the marketplace of ideas was ever legitimate for such regulation, today's technological advances certainly render such fear moot. Thus, the medium-based rights approach only hinders speakers—and continues to do injustice to the principles of the First Amendment.

This Court should discard that approach and apply full First Amendment protection to all messages without regard to the medium upon which they are delivered. The recognition of cable as a full-fledged member of the press is critical, not merely for the First Amendment rights of cable operators and cable programmers, but for the new press technologies which are on the horizon (indeed they are here).

[36] *See, e.g.*, P. Huber, M. Kellogg & J. Thorne, THE GEODESIC NETWORK II: 1993 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY (1992).

Cable and all electronic publishers should be given the same level of First Amendment protection that the print medium is given under *Tornillo*. The Framers of the First Amendment did not contemplate calibrating rights based on how the message is delivered. Such a diminution of First Amendment principles in this electronic age will inevitably lead to less protection for all speech. Rather than trying to create First Amendment categories for each new medium, the Court should focus on the message, and not the medium, and apply one level of First Amendment protection.

In striking down the first set of must-carry rules, *Quincy* noted that "traditional First Amendment doctrine [does not] fall[] by the wayside when evaluating the protection due novel modes of communication. For the core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1448. Cable operators and programmers deliver messages no less than the print press. That should be the only relevant fact for First Amendment analysis. Cable television is entitled to the same level of First Amendment protection that the print press enjoys, as are all electronic publishers. Perhaps Justice Douglas presented the best defense for such an approach in his concurrence in the *CBS* decision:

> What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old-fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that Government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under

> the laissez-faire regime which the First Amendment sanctions.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 160-61 (Douglas, J., concurring).

CONCLUSION

For all the above reasons, this Court should strike the must-carry regulations of the Cable Act of 1992 as violative of the First Amendment.

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